Office Supreme Court, U.S.
FILED
DEC 14 1982
ALEXANDER L. STEVAS,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NO. 82-805

LUBBOCK INDEPENDENT SCHOOL DISTRICT ET AL.,
Petitioners

v.

LUBBOCK CIVIL LIBERTIES UNION,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

THOMAS J. GRIFFITH
1208 Thirteenth Street
Lubbock, Texas 79401
(806) 762-0275
Counsel of Record for Respondent

RALPH H. BROCK
P. O. Box 959
Lubbock, Texas 79408
(806) 762-5671
Of Counsel for Respondent

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

I

QUESTION PRESENTED

Whether it is an unconstitutional establishment of religion to permit primary and secondary student religious groups "to gather at [public school facilities] with supervision either before or after regular class hours. . . ."

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	1
OPINIONS BELOW	1
CONSTITUTIONAL PROVISIONS, STATUTE AND REGULATION INVOLVED	2
STATEMENT	3
REASONS WHY THE WRIT SHOULD BE DENIED	
1. The Fifth Circuit's decision is not inconsistent with this Court's decision in *Widmar v. Vincent*, 454 U.S. 263 (1981)	6
2. The Fifth Circuit properly applied the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971)	10
a. *Secular purpose*	10
b. *Primary effect of the policy*	13
c. *Entanglement with religion*	16
3. State neutrality toward religion is not to be equated with hostility toward religion	18
4. The Petition should be stricken because the District has permitted itself to be represented by counsel who speak in the interest of the Christian Legal Society	19
CONCLUSION	22
APPENDIX	A-1

TABLE OF AUTHORITIES

CASES

	Page
Brandon v. Board of Education, 635 F.2d 971 (2nd Cir. 1980), *cert. den'd*, 454 U.S. 1123 (1981)	6, 7, 9, 12, 13, 19, 22
Cantwell v. Connecticut, 310 U.S. 296 (1940)	9
Collins v. Chandler Unified School District, 644 F.2d 759 (9th Cir. 1981), *cert. den'd*, 454 U.S. 863 (1981)	6
Commissioner of Education v. School Committee of Leyden, 358 Mass. 776, 267 N.E.2d 226 (1971), *cert. den'd*, 404 U.S. 849 (1971)	9, 16
DeSpain v. DeKalb County Community School District, 384 F.2d 836 (7th Cir. 1967), *cert. den'd*, 390 U.S. 906 (1968)	6
Engel v. Vitale, 370 U.S. 421 (1962)	13, 15, 16, 17, 19
Everson v. Board of Education, 330 U.S. 1 (1947)	6, 12, 18
Hunt v. Board of Education, 321 F. Supp. 1263 (S.D. W.Va. 1971)	9
Johnson v. Huntington Beach Union High School District, 68 Cal. App. 3d 1, 137 Cal. Rptr. 43 (1977), *cert. den'd*, 434 U.S. 877 (1977)	9
Karen B. v. Treen, 653 F.2d 897 (5th Cir. 1981), *aff'd*, 455 U.S. 913 (1982)	6
Kent v. Commissioner of Education, 402 N.E.2d 1340 (Mass. 1980)	9
Lemon v. Kurtzman, 403 U.S. 602 (1971)	5, 10
Mangold v. Albert Gallatin Area School District, 438 F.2d 1194 (3rd Cir. 1971)	6
McCollum v. Board of Education, 333 U.S. 203 (1948)	8, 9, 10, 11, 12, 14, 16, 18, 19
Meltzer v. Board of Public Instruction, 548 F.2d 559 (5th Cir. 1977), *cert. den'd*, 439 U.S. 1089 (1979)	9
Roemer v. Board of Public Works, 426 U.S. 736 (1976)	11
School District of Abington Township v. Schempp, 374 U.S. 203 (1963)	7, 9, 10, 12, 13, 15, 17, 18, 19
Stein v. Oshinsky, 348 F.2d 999 (2nd Cir. 1965), *cert. den'd*, 382 U.S. 957 (1965)	6, 9
Stone v. Graham, 449 U.S. 39 (1980)	9, 10, 17
Tilton v. Richardson, 403 U.S. 672 (1971)	11, 13
Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969)	13
Walz v. Tax Commission, 397 U.S. 664 (1970)	10, 16
Widmar v. Vincent, 454 U.S. 263 (1981)	6, 7, 8, 10, 11, 13
Wolman v. Walters, 433 U.S. 229 (1977)	16
Zorach v. Clauson, 343 U.S. 306 (1952)	12, 16, 19

Page

CONSTITUTIONAL PROVISIONS

TEX. CONST. ANN., art. 1, sec. 6 and 7 (1955) 2, 11
U.S. CONST., amend. I ..... *passim*

STATUTES

TEX. ED. CODE ANN., § 21.032, *et seq.* (1972 and Supp. 1982) 15
TEX. FAMILY CODE ANN., § 12.04(2) (Supp. 1982) 2, 11

MISCELLANEOUS

CODE OF PROFESSIONAL RESPONSIBILITY, D.R. 5-105(C) .. 21
CODE OF PROFESSIONAL RESPONSIBILITY, D.R. 5-107(B) .. 21
Department of Commerce, *Statistical Abstract of the United States* 55 (100th ed. 1979) 7
Ethics Committee of the New York Bar Association, *Opinion* No. 116 (1928-29) 21
Lubbock Chamber of Commerce, *Lubbock, Texas . . . at a Glance* (1982) 7
RULES OF THE SUPREME COURT OF THE UNITED STATES, Rule 36 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NO. 82-805

LUBBOCK INDEPENDENT SCHOOL DISTRICT ET AL.,
Petitioners

v.

LUBBOCK CIVIL LIBERTIES UNION,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The Fifth Circuit's decision in this case is reported at 669 F.2d 1038. The District Court's opinion was not published. Reference to the Petitioners in this Brief will be by the term "the District," while the Respondent will be called "the Union."

CONSTITUTIONAL PROVISIONS, STATUTE AND REGULATION INVOLVED

The First Amendment to the United States Constitution and the regulation involved (Paragraph 4 of the August 26, 1980, statement of policy on religion in the schools of the Lubbock Independent School District) are set forth in the Petition at p. 2.

Article 1, sections 6 and 7 of the Constitution of the State of Texas provide:

> Sec. 6. All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. No man shall be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent. No human authority ought, in any case whatever, to control or interfere with the right of conscience in matters of religion, and no preference shall ever be given by law to any religious society or mode of worship. But it shall be the duty of the Legislature to pass such laws as may be necessary to protect equally every religious denomination in the peaceable enjoyment of its own mode of public worship.
>
> Sec. 7. No money shall be appropriated, or drawn from the Treasury for the benefit of any sect, or religious society, theological or religious seminary; nor shall property belonging to the State be appropriated for any such purpose.

Section 12.04(2) of the Texas Family Code provides:

> Except as otherwise provided by judicial order or by affidavit or relinquishment of parental rights executed under Section 15.03 of this code, the parent of a child has the following rights, privileges, duties,

and powers: * * * (2) the duty of care, control, protection, moral and religious training and reasonable discipline of the child * * *.

STATEMENT

Respondent Lubbock Civil Liberties Union brought the cause of action described in the Petition (pp. 2-3) because officials of the District, ignoring the Union's complaints, had permitted religious activities to continue unabated in the schools for nearly ten years. (Petition App. A, pp. 2a-3a).[1] During this time, the District's counsel notified the Union by letter dated May 3, 1971, that school policy "must be strict neutrality of all personnel regarding religious activities" and declared that the practices would cease. (*Id.*). They did not.[2]

After receiving additional complaints, the District's Board of Trustees adopted a supplemental written policy on religion in January, 1979, and later adopted procedures permitting "student initiated and directed religious

---

1. Whether the District "approved" of the practices is of little moment; the District stipulated that Bible passages, religious inspirational passages and prayers were read over the public address system, that periods of silent meditation were ended with "Amen" over the public address system, and that Gideon Bibles were distributed, pursuant to written policy, to students in the fifth and sixth grades. There was also evidence of the occurrence of religious activities before assemblies. (Petition App. B, p. 28a). As the district court observed, "the fact is that the ultimate control remained in the school. . . ." (*Id.*, p. 29a). A full report of all such activities, and others, was before the District Trustees when they directed a continuation of such practices. (n. 3, *infra*).

2. After the District's counsel wrote that the practice of placing Gideon Bibles "in the hands of students" would be discontinued, for instance, the Gideons were permitted instead to place their New Testaments on a table for students to pick up. (Petition App. A, p. 3a, n. 3).

activities." (*Id.*, p. 4a).[3] The Board's own minutes indicate that the unconstitutional practices were to be permitted to continue, and its own surveys indicate that they did. (*Id.*, p. 5a).

The Union filed this lawsuit the following September, but the District waited another eleven months, until after discovery, the pretrial order and docketing for trial, before adopting its new religion policy of August 26, 1980. (*Id.*, pp. 5a-6a).[4] Though purporting to proscribe most of the prior religious activities, the policy did authorize, in Paragraph 4, supervised student religious gatherings before and after class hours,[5] and the Union "strongly urge[d]" the unconstitutionality of that provision before the trial court (Petition, p. 2), to no avail. (Petition App. B, p.

---

3. The policy reads *in toto* as follows:
Insofar as religion is concerned, the Lubbock Independent School District adheres to the principle of freedom of religion as expressed in the Constitution of the United States and the Constitution of the State of Texas.
(Petition App. A, p. 4a). Before procedures to implement the policy were adopted, one of the District's trustees suggested that divine guidance might be needed to interpret the rule. (Reporter's transcript of proceedings, hereinafter designated "Tr.", 332-33).

4. The adoption of the new policy, which expressly superseded that of January, 1979, did not render moot the question of whether the prior practices were unconstitutional and deprived students of First Amendment rights, and the trial court found the District's acts, conduct and practices under that policy to be unconstitutional. (Petition App. B, pp. 29a-30a). This issue, along with the issues of damages and injunctive relief originally pleaded by the Union, have not been preserved for review.

5. Paragraph 4 provides:
The School Board permits students to gather at the school with supervision either before or after regular school hours on the same basis as other groups as determined by the school administration to meet [sic] for any educational, moral, religious or ethical purposes so long as attendance at the meetings is voluntary.

32a). That court seemed satisfied to say, without consideration of the three-part test announced in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971),[6] that if the religious activity groups gathered voluntarily and without expense to the District, there was no establishment clause violation. (Petition App. B, p. 32a).[7]

On appeal taken by the Union, a panel of the Fifth Circuit properly applied the *Lemon v. Kurtzman* test (Petition App. A, pp. 13a-20a) to conclude:

> (1) that the pre-eminent purpose of Paragraph 4, in the context of the total school policy on religious activities, is "more clearly designed to allow the meeting of religious groups," and that such proffered secular justifications as the development of leadership and communicative skills "cannot withstand scrutiny when those goals can be attained through non-religious associations." (*Id.*, pp. 13a-14a);
>
> (2) that Paragraph 4, "in the context of the overall policy of which it is an integral part," authorizing as it does "supervised student meetings at a time closely associated with the school day" implies "support and approval of the religious meetings" that has the primary effect of advancing religion. (*Id.*, pp. 15a-18a); and

---

6. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion * * *; finally, the statute must not foster "an excessive government entanglement with religion." [Citation omitted].

7. The trial court studiously avoided any mention of the supervision requirement, or of the unfettered discretion reserved to administrators in paragraph 4 to determine which religious groups would be acceptable to use facilities "on the same basis as other groups."

(3) that the entanglement created by Paragraph 4's supervision requirement and the use of school facilities leads to an impermissible establishment of religion. (*Id.*, pp. 18a-20a).

A dissent to the denial for motion for rehearing *en banc* (Petition App. D) attempted to reassert the time-worn and discredited notion that the requisite governmental neutrality toward religious believers and nonbelievers alike, *Everson v. Board of Education*, 390 U.S. 1, 18 (1947), might be equated with the notion "that our government and the courts and the schools are hostile to all religious belief and practice." (*Id.*, p. 41a).

REASONS WHY THE WRIT SHOULD BE DENIED

1. The Fifth Circuit's decision is not inconsistent with this Court's decision in *Widmar v. Vincent*, 454 U.S. 263 (1981).

This is an establishment clause case, and the Fifth Circuit's ruling follows the settled law found in the pertinent decisions of this Court. There is no conflict with decisions from other circuits,[8] and the District makes no

8. *Brandon v. Board of Education*, 635 F.2d 971 (2nd Cir. 1980), *cert. den'd*, 454 U.S. 1123 (1981), which will be discussed, *infra*, is directly in point. Other recent cases where public school religious practices have been held to violate the establishment clause include *Karen B. v. Treen*, 653 F.2d 897 (5th Cir. 1981), *aff'd*, 455 U.S. 913 (1982); *Collins v. Chandler Unified School District*, 644 F.2d 759 (9th Cir. 1981), *cert. den'd*, 454 U.S. 863 (1981); *Mangold v. Albert Gallatin Area School District*, 438 F.2d 1194 (3rd Cir. 1971); *DeSpain v. DeKalb County Community School District*, 384 F.2d 836 (7th Cir. 1967), *cert. den'd*, 390 U.S. 906 (1968); *Stein v. Oshinsky*, 348 F.2d 999 (2nd Cir. 1965), *cert. den'd*, 382 U.S. 957 (1965).

such contention. Similarly, it does not argue that its failure to provide religious facilities would effectively foreclose or even impair students' practice of religion, nor that Paragraph 4 is mandated by the free exercise clause.[9]

The District does, however, attempt to manufacture a conflict with this Court's decision last term in *Widmar v. Vincent*, 454 U.S. 263 (1981). Its argument, though, fails to recognize the different principles of law involved in the two cases, and in placing its reliance in *Widmar*, the District strays beyond the scope of the establishment clause question it has presented. (Petition, p. i).

Throughout the trial and appeal, the District adhered to its defense of Paragraph 4 as a vindication of the free exercise clause. (Petition App. A, p. 20a). The Union insisted, and the Fifth Circuit agreed, that Paragraph 4 permitted an unconstitutional establishment of religion. (*Id.*, p. 22a). The opinion below quoted frequently with approval from the decision in the identical case of *Brandon v. Board of Education*, 635 F.2d 971 (2nd Cir. 1980), *cert. den'd*, 454 U.S. 1123 (1981), where the court held that to compel the school district to permit religious ac-

---

9. The District operates 48 public schools, while there are "over 240 churches representing every major denomination" in the City of Lubbock. Lubbock Chamber of Commerce, *Lubbock, Texas . . . at a Glance* (1982). Appropriate religious assembly facilities would include thousands of homes and privately owned theatres and commercial buildings. Nationwide in 1977, the year mentioned by the District (Petition, p. 8, n. 7), students in the 88,025 public schools had their choice of attending any of the 333,175 churches also in operation. Department of Commerce, *Statistical Abstract of the United States* 55 (100th ed. 1979). It is difficult to argue that but for the District's benevolence, *any* student would be denied the opportunity to worship as he or she chose. *Cf. School District of Abington Township v. Schempp*, 374 U.S. 203, 226, n. 10 (1963), which mentions, without comment, the practice of holding religious services for military personnel who otherwise would be unable to practice their faiths.

tivities before and after class hours would violate the establishment clause.[10] Now, almost as an afterthought, the District argues that *Widmar* controls this case.[11]

This Court's decision in *Widmar* turned not on the religion clauses, but on the free speech clause of the First Amendment, and the Court distinguished *Widmar* from cases such as this precisely on that basis. *Id.*, 454 U.S. at 273, n. 13. This is an establishment clause case, not a free exercise nor a free speech case, and when that is recognized and understood, the paradox discovered by the District (Petition, p. 9) evaporates into the ether out of which it was conjured.

Nor does this case raise the question reserved in *Widmar* that would arise if state accommodation of free exercise and free speech rights should conflict with the prohibitions of the establishment clause. *Id.* It is true that the free

---

10. The District says there is a difference between the question of whether a public school *may* provide voluntary religious groups with equal access to school facilities, and whether it *must* (Petition, pp. 8-9), but that ignores the obvious: the unconstitutionality of the religious activity is the same. *Compare McCollum v. Board of Education*, 333 U.S. 203 (1948), where the Court held unconstitutional the permissive practice of allowing religious instruction in public schools during class hours. The District's distinction is one without a difference. On the other hand, its theory, that Paragraph 4 at once accommodates the students' free exercise rights (Petition, p. 15) and yet serves a secular purpose (Petition, p. 10) is too self-contradictory to merit discussion.

11. The District's free speech theory was not litigated below, and the Union respectfully suggests that it came too late, on motion for rehearing at the appellate level, for certiorari review. If free speech had been the goal, there would have been no "as determined by the school administration" test. The administration's determination was demonstrated conclusively to promote evangelistic Protestant doctrine and to suppress by prohibition and punishment such heresy as Catholicism (n. 26, *infra;* Tr. pp. 61-64; 351-53; 355-58; 362-65; 369; 380; 396-401; 405-06; D. Ex. 22).

exercise clause clearly prohibits the use of state action to deny the rights of free exercise to anyone, but a violation of that clause "is predicated on coercion while the Establishment Clause violation need not be so attended." *School District of Abington Township v. Schempp*, 374 U.S. 203, 223 (1963). The District has demonstrated no such coercive free exercise violation to conflict with the violation presented here.[12] Thus, the only issue is whether the majority may use "the machinery of the State to practice its beliefs," *Id.* at 226, and since the establishment clause emphatically forbids such use,[13] the question presented does not warrant review by this Court.

---

12. Properly construed, the religion clauses complement rather than conflict. One prohibits the compulsory acceptance of any creed or form of worship, while the other guarantees the free exercise of the chosen practice. "Thus the Amendment embraces two concepts, —[sic] freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be." *Cantwell v. Connecticut*, 310 U.S. 296, 303-304 (1940).

13. While the establishment clause makes no mention of the separation of secular student groups and the state, it does dictate the separation of student religious groups and the state. In every case involving organized religious exercises in the public schools, compulsory or voluntary, state or student initiated, publicly or privately financed, the practices have been declared violative of the establishment clause. *See*, e.g., *Stone v. Graham*, 449 U.S. 39 (1980); *School District of Abington Township v. Schempp, supra; Engel v. Vitale*, 370 U.S. 421 (1962); *McCollum v. Board of Education, supra; Brandon v. Board of Education, supra; Meltzer v. Board of Public Instruction*, 548 F.2d 559 (5th Cir. 1977), *cert. den'd*, 439 U.S. 1089 (1979); *Stein v. Oshinsky, supra; Hunt v. Board of Education*, 321 F. Supp. 1263 (S.D. W.Va. 1971); *Kent v. Commissioner of Education*, 402 N.E.2d 1340 (1980); *Johnson v. Huntington Beach Uni[illegible] High School District*, 68 Cal. App. 3d 1, 137 Cal. Rptr. 43 (197[illegible], *cert. den'd*, 434 U.S. 877 (1977); *Commissioner of Education v. School Committee of Leyden*, 358 Mass. 776, 267 N.E.2d 226 (1971), *cert. den'd*, 404 U.S. 849 (1971); and other cases mentioned in note 8, *supra*.

2. The Fifth Circuit properly applied the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

Paragraph 4, promulgated as part of a policy "relating to religion" (Petition App. A, pp. 5a-6a, n. 7) is not calculated to serve a secular purpose, and the principal or primary purpose of the policy is studiously to advance religion. Moreover, the use of public school facilities and the supervision requirement each constitute "an excessive government entanglement with religion." *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970). If Paragraph 4 violates *any* of the three *Kurtzman* principles, it is violative of the establishment clause. *Stone v. Graham*, 449 U.S. 39, 40-41 (1980).

a. **Secular Purpose.** The District's "neutral, nonpreferential policy of equal access" (Petition, p. 9) demonstrates either its misunderstanding of or its disregard for settled establishment clause principles. The neutrality which the First Amendment requires is that which neither favors nor affirmatively opposes religion. *School District of Abington Township v. Schempp, supra*, 374 U.S. at 225. As Mr. Justice Frankfurter wrote, concurring in the Court's decision in *McCollum v. Board of Education*, 333 U.S. 203 (1948), "[s]eparation is a requirement to abstain from fusing functions of Government and of religious sects, *not merely to treat them all equally*." [Emphasis supplied]. *Id.* at 227.

Widmar v. Vincent, 454 U.S. 263 (1981), upon which the District places total reliance, is inapposite. *Widmar* involved a university, and the secular neutrality required of a public school was not an issue. Moreover, its holding is limited expressly "to the context of a public forum

created by the University itself." *Id.* at 276, n. 20. On the other hand, as this Court has acknowledged on several occasions, there are "generally significant differences" between institutions of higher learning and elementary and secondary schools. College students are "less impressionable and less susceptible to religious indoctrination" than younger ones. *Tilton v. Richardson*, 403 U.S. 672, 685-86 (1971). *See also Widmar v. Vincent, supra*, 454 U.S. at 274, n. 14; and *Roemer v. Board of Public Works*, 426 U.S. 736, 750 (1976).[14] Mr. Justice Frankfurter recognized this impressionability when he went on to observe that "[i]n no activity of the State is it more vital to keep out devisive forces than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart." *McCollum v. Board of Education, supra*, 333 U.S. at 231.

---

14. In *Roemer* the Court noted that "[c]ollege students are less susceptible to religious indoctrination; college courses tend to entail an internal discipline that inherently limits the opportunities for sectarian influence; and a high degree of academic freedom tends to prevail at the college level." *Id.* at 750.

The District here, by supervising religious sessions, would usurp the exclusive right and power of the Texas parent to provide moral and religious training, TEX. FAMILY CODE ANN. § 12.04(2) (Supp. 1982), and would convert the tax-erected school house into a church for temporary periods in direct violation of the Texas Bill of Rights, TEX. CONST. ANN. art. 1, sec. 6 and 7 (1955). In *Tilton*, 8 justices agreed the Establishment Clause would be violated if any religious worship or instruction were ever permitted in college or university buildings constructed with federal funding. The unbroken history of classroom Bible reading and distribution in this case (the latter is still expressly permitted by a never-repealed regulation), of compulsory assembly, militant evangelism, and prohibition of Catholic, Jewish, Unitarian, Muhammadan, Buddhist, and other religious observances and practices render clear the purpose and effect of "supervised" religious assembly. The falsity of the District's avowal that assembly would be at no cost is obvious to any parent who has shouted "Shut that door" to a vanishing child and a North wind.

The organization of public schools is premised upon the isolation of secular education from all religious teaching, *School District of Abington Township v. Schempp, supra,* 374 U.S. at 218, quoting from *Everson v. Board of Education,* 330 U.S. 1, 23-24 (1947) (opinion of Jackson, J., dissenting).[15] Thus "the students' free speech and associational rights, cognizable in a 'public forum,' are severely circumscribed by the Establishment Clause in the public school setting." *Brandon v. Board of Education,* 635 F.2d 971, 980 (2nd Cir. 1980), *cert. den'd,* 454 U.S. 1123 (1981).

Indeed, the District's "secular purpose" argument is not really that Paragraph 4 would vindicate students' free speech rights (although it presses that point later, Petition, p. 15), but that the policy "fosters the students' intellectual, cultural, and social growth *and thereby furthers the essential goals of public education.* (Petition, p. 10, emphasis supplied). An exercise of such pre-eminent religious character is not consistent with the District's secular excuses,[16] *School District of Abington Township v.*

---

15. On the premise that public schools unduly monopolized the children's time and that the churches were entitled to a share of it, religious leaders early in this century developed the concept of "released time" programs which tended to take the form later approved in *Zorach v. Clauson,* 343 U.S. 306 (1952). The teaching was on church premises, the school had no control over the choice of instructors nor the subject matter taught, and it did not assume any responsibility for the students' attendance, conduct or achievement in the church school. "[O]nly when challenge is made to the share that the public schools have in the execution of a particular 'released time' program" does the necessity for judicial scrutiny arise. *McCollum v. Board of Education, supra,* 333 U.S. at 224-25 (opinion of Frankfurter, J., concurring).

16. The secular reasons mentioned in the District's Petition must be regarded as speculative at best since, as the court below noted, there was no testimony from school board members or school authorities to support the District's claims. (Petition App. A, p. 14a, n. 13).

Schempp, supra, 374 U.S. at 224, and as the court below concluded, the state may not employ religious means to serve otherwise legitimate secular interests. (Petition App. A, p. 14a).

b. **Primary Effect of the Policy.** Just as First Amendment rights generally must be analyzed " 'in light of the special characteristics of the school environment,' " *Widmar v. Vincent, supra,* 454 U.S. at 268, n. 5, quoting from *Tinker v. Des Moines Independent School District,* 393 U.S. 503, 506 (1969), so must the analysis be further refined when the environment is a public school as opposed to a university campus. As the Union has already noted in the text accompanying note 14, *supra,* this Court has long recognized the impressionability of public school children. It follows that public schools, unlike public universities, are not public forums, and while students have First Amendment rights to political speech in public schools, "sensitive Establishment Clause considerations limit their right to air religious doctrines." *Brandon v. Board of Education, supra,* 635 F.2d at 980.

Since the issue must be decided under the establishment clause, the crucial inquiry becomes not whether some incidental benefit accrues to a religious institution, but whether Paragraph 4 advances religion. *Tilton v. Richardson,* 403 U.S. 672, 679 (1971). The primary effect test necessarily inquires whether the consequence of the state action is to place its imprimatur upon the religious activity. *School District of Abington Township v. Schempp, supra,* 374 U.S. at 216-19; *Engel v. Vitale,* 370 U.S. 421, 430-36 (1962).[17]

17. While one does wonder how the District would implement its policy in kindergarten and the primary grades (Petition, p. 13, n. 11), the appellate court's decision turned on no such speculation.

Paragraph 4 authorizes a practice virtually identical to the one condemned in *McCollum v. Board of Education*, 333 U.S. 203 (1948), except that the religious meetings here must be held "with supervision either before or after school hours."[18] The court below correctly observed that Paragraph 4 appears as a part of a policy on religious activities in the schools, the preamble of which "is obviously concerned with religious beliefs and the place of *religion* in the public schools." (Petition App. A, p. 13a, emphasis in original).[19]

The District fails to apprehend the fundamental distinction between free exercise and establishment clause violations, arguing as it does here (Petition, p. 11-12) and below (Petition App. A, p. 16a-17a) that since the

---

Rather, it was the District's implicit recognition and approval of religious activities and meetings as an integral part of its extra-curricular program, "in combination with the impressionability of secondary and *primary* age school children and the possibility that they would misapprehend the involvement of the District in these meetings [that] renders the primary effect of the policy impermissible advancement of religion." (Petition App. A, p. 15a-16a, emphasis in original). Indeed, the Lubbock teacher or administrator announcing a religious meeting after school would not have to add that he would take attendance to indicate compulsory attendance—but history forces the conclusion that he would add that admonition.

18. In *McCollum*, religious teachers employed by private religious groups were permitted to teach religion for thirty minutes each week during regular school hours. 333 U.S. at 205. The supervision contemplated in Paragraph 4 would be either by a school employee or a non-school employee acceptable to the District. (Petition App. A, p. 18a, n. 16).

19. The preamble to the August 26, 1980 policy on religion states:

> Wishing not to infringe either upon the belief of any student in a Supreme Being or upon the right of any student not to believe, the School Board places in effect the following policies relating to religion in the schools which supercede the policy on religion adopted on January 25, 1979.

(Petition App. A, p. 5a-6a, n. 7).

supervised religious meetings are voluntary and occur outside regular school hours, no coercion is involved. Coercion is not the issue. As this Court explained twenty years ago:

> Neither the fact that the prayer may be denominationally neutral *nor the fact that its observance on the part of the students is voluntary* can serve to free it from the limitations of the Establishment Clause, as it might from the Free Exercise Clause of the First Amendment, both of which are operative against the States by virtue of the Fourteenth Amendment. Although these two clauses may in certain instances overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom. *The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion* and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not.

Engel v. Vitale, supra, 370 U.S. at 430 (emphasis supplied). Likewise, in *School District of Abington Township v. Schempp, supra,* the Court observed that neither the opportunity for individual students to absent themselves nor the claim that the religious practices may be relatively minor encroachments on the First Amendment furnish any defense to a claim of unconstitutionality under the establishment clause. *Id.*, 374 U.S. at 224-25.

Finally, as the court below found, the supervised religious gatherings are permitted at a time closely associated with the school day, and the Texas compulsory education machinery[20] which draws the students to school

20. TEX. ED. CODE ANN. § 21.032, et seq. (1972 and Supp. 1982).

also provides any audience that is available for the religious activities. (Petition App. A, p. 17a). This "invaluable aid" has the primary effect of advancing religion, and it is not separation of church and state. *McCollum v. Board of Education, supra,* 333 U.S. at 212.

c. **Entanglement with Religion.** The policy which underlies Paragraph 4 is much more than the mere accommodation of school schedules to a program of outside religious instruction or closing the doors or suspending the operations "as to those who want to repair to their religious sanctuary for worship or instruction." *Zorach v. Clauson,* 343 U.S. 306, 315-16 (1952).[21] It entails the very "sponsorship, financial support, and active involvement of the sovereign in religious activity" which the drafters of the religion clauses sought to forestall. *Walz v. Tax Commission,* 397 U.S. 664, 668 (1970).[22]

---

21. The District seems to suggest that since "[w]e are a religious people whose institutions presuppose a Supreme Being," *Zorach v. Clauson, supra,* 343 U.S. at 313, establishment clause considerations go by the wayside. (Petition, p. 16). The author of the *Zorach* opinion, though, explained in his concurrence in *Engel v. Vitale, supra,* that " 'If a religious leaven is to be worked into the affairs of our people, it is to be done by individuals and groups, not by the government.' *McGowan v. Maryland,* 366 U.S. 420, 563 (dissenting opinion)." *Engel v. Vitale, supra,* 370 U.S. at 442-43 (opinion of Douglas, J. concurring).

22. The after-hours requirement does not save Paragraph 4 from constitutional scrutiny. (Petition, p. 12). To the contrary, in *Wolman v. Walter,* 433 U.S. 229, 255 (1977), transportation provided to sectarian schools for extracurricular activities was held to violate the establishment clause. In this case, as in *McCollum v. Board of Education, supra,* it is the supervision requirement, the compulsory attendance machinery, and the free benefit of school facilities, classrooms, heat and light, not merely the time of day, which creates the unconstitutional entanglement. *Id.,* 333 U.S. at 212. *Compare Commissioner of Education v. School Committee of Leyden,* 358 Mass. 776, 276 N.E.2d 226 (1971), *cert. den'd,* 404 U.S. 849 (1971), where voluntary student initiated, pre-class religious exercises were

The District would shift the focus of the inquiry by arguing that the "monitoring and censorship" required to enforce a prohibition of religious activity in the public schools would create a greater entanglement with religion than Paragraph 4 does. (Petition, pp. 14-15).[23] Once again the District confuses free exercise considerations with those of the establishment clause. Nothing in the First Amendment requires the District to police non-religious activities and weed out any mention of religion, and certainly it does not proscribe the private reading of religious literature, private discussions about religion among students, or even a hasty private prayer before an important exam.[24] What the establishment clause *does* prohibit is the officially sanctioned, supervised religious activity permitted by Paragraph 4.

The court below correctly applied the three-part test to conclude that Paragraph 4 fosters an impermissible establishment of religion. The court's conclusion is grounded in settled principles of law, and the District's effort to persuade this Court, in effect, to consider overruling decades of "inapposite school prayer cases" (Petition, p. 12) only serves to point up the District's misunder-

---

held unconstitutional because they were on public property "with school committee permission granted by a resolution" and teacher participation was allowed. *Id.* at 228.

23. A strange plaint from the same governmental authority that volunteers to supervise religious activities and even mandates their supervision in the contested regulation. Is it easier to detect and restrain heresy than government-issue religion?

24. Indeed, the objective presentation of comparative religion or religious history, or the study of the Bible for its literary and historic qualities, is not only permissible, but is to be encouraged. *School District of Abington Township v. Schempp, supra,* 374 U.S. at 225. *See also Stone v. Graham,* 449 U.S. 39, 42 (1980); *Engel v. Vitale, supra,* 370 U.S. at 435, n. 21).

standing of the establishment clause principles involved. The question presented does not warrant review by this Court.

3. State neutrality toward religion is not to be equated with hostility toward religion.

This Court wrote in *Everson v. Board of Education*, 330 U.S. 1, 15 (1947), that "[n]either a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."[25] The District's policy of "sound accommodation of the interests of a religious people" (Petition, p. 16) is not religiously neutral, and considered in the light of the District's history of religious discrimination, it can hardly be called "benevolent" either. (Petition, p. 15).[26]

The District concludes its Petition with that shibboleth of all establishmentarians, that disestablishment is not

---

25. *Accord, School District of Abington Township v. Schempp, supra*, 374 U.S. at 216; *McCollum v. Board of Education, supra*, 333 U.S. at 210.

26. In the past, the District's "neutrality" has taken the form of sanctioning "student initiated religious activities in accordance with the will of the majority". (Tr. 173, 211-12, 258-59, 351-52, 357-58, 369-70). Gideons, for example, could distribute their New Testaments, but Jehovah's witnesses could not pass out the *Watchtower* (Tr. 404-06), and Catholic and Buddhist parents who complained about the Gideon distribution in one school found their children removed from class and detained until they came to school and explained their complaint to the principal (Tr. 284-98).

Generally speaking, practices outside of the Protestant Christian tradition were not permitted (Tr. 250). Muhammadan, Buddhist, Shinto or Hindu prayers, for instance, could not be recited (Tr. 356-57); and even Roman Catholic Christian prayers were prohibited (Tr. 225-26, 352-53, 355, 376), while Protestant prayer was compelled.

neutral toward religion, but hostile instead.[27] That sophistry was first rejected nearly 35 years ago in *McCollum v. Board of Education, supra,* 333 U.S. at 211-12, and again in *Zorach v. Clauson, supra,* 343 U.S. at 314, *Engel v. Vitale, supra,* 370 U.S. at 435, and *School District of Abington Township v. Schempp, supra,* 374 U.S. at 225. It is no more meritorious today, and the question presented does not warrant review.

4. The Petition should be stricken because the District has permitted itself to be represented by counsel who speak in the interest of the Christian Legal Society.

The Christian Legal Society is an organization of evangelical Christian lawyers which, for its own sectarian reasons, has concerned itself with the outcome of this case. Ordinarily, such an organization would petition to appear *amicus curiae,* and Rule 36 of this Court prescribes the procedure to make such an appearance.

The Christian Legal Society elected not to appear *amicus curiae* in this case. Instead, it retained the Texas

---

27. The District takes its cue from the dissent below (Petition App. D, p. 48a), which fell into the same trap, and goes on to argue that the decision below "teaches Lubbock school children that speech is 'free' only so long as it is purged of religious content and that governmental 'neutrality' requires invidious discrimination against their own voluntary, self-initiated religious activity." In support of this fallacy, the District cites *Brandon v. Board of Education,* 635 F.2d at 978: "Such '[m]isconceptions' over the appropriate roles of church and state learned during one's school years may never be corrected."

Read in context, the "misconception" concerning the court was not governmental hostility toward religion, but just the converse: "the mere appearance of secular involvement in religious activities [which] might indicate that the state has placed its imprimatur on a particular religious creed. This symbolic inference is too dangerous to permit." *Id.*

and District of Columbia firm of Fulbright & Jaworski to appear as co-counsel with the District's counsel of record, who ostensibly remains in charge of the case. Nevertheless, according to the Christian Legal Society's executive director, that organization and its staff are the motivating force behind the Petition, and is actually doing the work:

> When [the Christian Legal Society] first began thinking about the Lubbock case, one of the questions was whether the alleged bad faith of the school district was going to make it impossible to effectively raise [sic] the larger issue but felt since it was now the case in the system and Christian student groups were being shut down throughout the United States on the basis of *Brandon v. Guilderland School District* and now *Lubbock*, there was little choice to fight where the battle raged.
>
> Initially, our concern was to gain certiorari from the Supreme Court. A task you know is quite difficult. In order to cali to the Court's attention the seriousness of this case, we felt that obtaining the assistance of someone like Jaworski might be very crucial. Through Bill Bright and others we contacted Mr. Jaworski who indicated a willingness to file an amicus brief. Then, of course, the question was whether an amicus brief would be adequate to get the Court's attention and *whether we didn't need more substantive involvement of* [sic] *the case*, and at that point, after discussions with Fulbright, Jaworski and present council [sic] for the school board, a minimal involvement as co-counsel by Fulbright and Jaworski was developed. *Most of the legal work being done by our own staff*—and I am unclear as to what the distinction is between employing our own staff and employing other competent staff.

App., *infra* (emphasis supplied).

The issue is not who does the work, but for whom it is done. The situation here is not unlike the one addressed by the Ethics Committee of the New York Bar Association,[28] where an attorney proposed to represent property owners opposing a zoning change to allow the erection of a garage, but who was actually compensated by competitive garage owners who objected to it for business reasons. The Committee concluded that it is improper for an attorney to represent one client when he is really speaking in the interest of another. Similarly here, while Fulbright & Jaworski purports to represent the District, the executive director's letter (App.) makes it clear that the firm is really speaking for the interest of the Christian Legal Society.[29]

The Union would respectfully suggest that if this does not represent a fraud on the Court, the District's complicity in this scheme, at the very least, ignores the untenable and irreconcilable conflict of interest between the avowedly sectarian goals of the Christian Legal Society and the constitutional requirement of sectarian neutrality by which the District must abide. The Union thus submits that the District's Petition should be stricken and its prayer for a writ of certiorari denied.

---

28. Ethics Committee of the New York Bar Association, *Opinion* No. 116 (1928-29).

29. This is not a situation where a lawyer represents multiple clients after full disclosure and consent, Code of Professional Responsibility, D.R. 5-105(C), for the Christian Legal Society is not a party before the Court. Nor is this merely a situation where a lawyer, paid to render legal services for another, permits his professional judgment to be directed or regulated by the one employing him, D.R. 5-107(B), for the District appears to have consented to do just that, playing the property owner for the Christian Legal Society's competitive garage owners.

CONCLUSION

This Court denied petition for writ in the mirror-image case of *Brandon v. Board of Education, supra.* Upon that precedent, and for the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

THOMAS J. GRIFFITH
1208 Thirteenth Street
Lubbock, Texas 79401
(806) 762-0275
Counsel of Record for Respondent

RALPH H. BROCK
P. O. Box 959
Lubbock, Texas 79408
(806) 762-5671
Of Counsel for Respondent

December, 1982